mandatory injunction in the delicate mechanism of industrial disputes and industrial negotiations."

In the light of all that I have discussed it would seem that the interlocutory injunction should not have been granted in this case.

In the circumstances I would allow the appeal with costs here and in the court below and set aside the injunction.

Chang Min Tat, F.J.: I agree for the reasons stated by my brother Abdoolcader J., that the appeal should be allowed.

Syed Othman F.J.: I too agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Kean Chye & Sivalingam; H.R. Sonkey & Co.*

THE "DONG MOON" TRANS ASIA SHIPPING CO. LTD. v. "DONG MOON" OWNERS & ORS.

[O.C.J. (Arulanandom J.) October 3, 11, 1977 and February 3, 1978]

[Penang — Admiralty Suit No. 6 of 1977]

Shipping — Arrest of vessel — Application to set aside — Unconditional appearance — Agreement to refer disputes to arbitration — Stay of proceedings — Order for release of vessel — Arbitration Act, 1952, s. 6.

Practice and Procedure — Arbitration — Agreement to refer disputes to arbitration — Stay of proceedings — Arbitration Act, 1952, s. 6.

In this case the defendants had let the ship to the plaintiffs and the plaintiffs claimed that the defendants were indebted to them for hire advances, supply of guards, services and disbursements in respect of the ship. The plaintiffs caused the ship to be arrested in Penang. The defendants applied for orders that the writ of summons be set aside or stayed and that the vessel be released. They claimed that they were not indebted as claimed to the plaintiffs and that there was an arbitration clause in the time charterparty. The plaintiffs resisted the application on a preliminary objection that unconditional appearance had been entered.

Held: (1) the fact that the defendants had entered an unconditional appearance did not preclude the court's right to entertain the application and make such order as it thinks fit;

(2) it was not disputed that it had been agreed between the parties that all disputes should be referred to arbitration and in the circumstances stay of proceedings should be granted to the defendants;

(3) as stay of proceedings had been granted the ship should be released.

Cases referred to:-

(1) *Wilkinson* v. *Barking Corporation* [1948] 1 All E.R. 564, 567; [1948] 1 K.B. 721.

(2) *Ive & Baker* v. *William* [1894] 2 Ch. D. 478.

(3) *The "Golden Trader"* [1974] 1 Lloyds Report 383.

(4) *The "Beauty Orchid II"* [1977] 2 M.L.J. 83, 84.

ADMIRALTY SUIT.

N.T. Vello for the defendants/applicants.

V. Thevendran for the plaintiffs/respondents.

Cur. Adv. Vult.

Arulanandom J.: This was an application by motion by counsel on behalf of the defendants for the following orders:—

(a) That the Writ of Summons and all subsequent proceedings herein be set aside and/or stayed on the ground that the arrest of the vessel herein was unlawful and is an abuse of the process of this Honourable Court.

(b) Alternatively that all further proceedings herein be set aside and/or stayed on the ground that the maintenance of the arrest of the said vessel is unlawful.

(c) Alternatively that all further proceedings herein be stayed pursuant to the provisions of the Arbitration Act 1962 in particular section 6 thereof, and clause 17 of the charterparty dated May 25, 1976 made between the plaintiffs and the defendants in which they expressly agreed to refer to arbitrate the matter in respect of which this action is commenced.

(d) Such further or other relief as this Honourable Court deems just.

(e) That the costs of and incidental of this motion be provided for.

The application was supported by the affidavit of one Bae Chun Yong the shipping manager of the defendant company the owners of the ship "Dong Moon" and also the ship "Dong Moon No. 3".

The brief history of the matter was that by a time charterparty dated May 25, 1976 the defendants as owners of the ship "Dong Moon No. 3" (hereinafter referred to as "the said ship") had let the said ship to the plaintiffs for a period of twelve months with an option for about a month more or less to the charterer and for stated consideration in the charterparty.

On September 6, 1977, the plaintiffs caused the ship or vessel "Dong Moon" to be arrested in the Port of Penang. The plaintiffs alleged that the defendants were and are indebted to them in the sum of US$89,951.27 alleged to be for charterhire advances, supply of goods, services and disbursements in respect of the ship or vessel "Dong Moon No. 3" which is a sister ship of the ship or vessel "Dong Moon", the said debt being alleged to have been incurred between the dates April 28, 1976 and August 24, 1977.

The defendants disputed the plaintiffs' claim and in the affidavit in support of this application it appears from the plaintiffs' statement of accounts that while the plaintiffs alleged in their affidavit leading to the warrant of arrest of "Dong Moon" that the amount of US$89,951.27 related only to the "Dong Moon No. 3", in fact the sum of US$35,706.12 related to Dong Moon and the sum of US$40,981.60 related to Dong Moon No. 3. Furthermore by a general statement of accounts of the defendants there is a credit balance in the hands of the plaintiffs of the amount of US$47.79.

Furthermore, while on September 6, 1977, the plaintiffs arrested the "Dong Moon" in Penang on the grounds that the defendants were indebted to them in the sum of US$89,951.27, at the same time they made a demand of US$30,000 from the defendants in Korea for release of the ship in Penang and a further $19,000 when the ship arrived in Singapore. It must be noted that the difference in the sums is not negligible.

The defendants now apply for the orders as in the notice of motion firstly on the grounds that they are not indebted as claimed to the plaintiffs and that the contradiction in their claims is evident of the lack of *bona fides* and is purely to embarrass the defendants and secondly because there is an arbitration clause in the time charterparty.

The plaintiffs resisted the application on a preliminary objection on the ground that unconditional appearance had been entered. It was argued that once unconditional appearance is entered, the jurisdiction of the court cannot be challenged. This submission is devoid of merit. One of the conditions which must be fulfilled in order to obtain a stay of proceedings is that no step should be taken after appearance. An unconditional appearance by itself is not a waiver of the defendants' right to apply for stay. In *Wilkinson* v. *Barking Corporation*[1] Asquith L.J. stated as follows:

"The Supreme Court may by statute lack jurisdiction to deal with a particular matter.... It has however jurisdiction to decide whether or not it has jurisdiction to deal with such matters and by entering an unconditional appearance a litigant submits to the former jurisdiction (which exists) but not to the latter (which does not)."

In the court's view the fact that defendants entered an unconditional appearance did not preclude the court's right to entertain the application and make such order as its thinks fit.

It is not disputed that under clause 17 of the time charter between the parties it was agreed between them that all disputes should be referred to Arbitration in Hong Kong.

Clause 17 of the time charter reads as follows: —

"17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at Hong Kong one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award this agreement may be made a rule of the court. The Arbitrators shall be commercial men."

The plaintiffs submit that these are claims which refer to "Dong Moon" which are not covered by the agreement. The court must indeed take a very unsympathetic if not a critical view of the plaintiffs, who when they arrested the ship alleged that the defendants were indebted to them in relation to the "Dong Moon No. 3" and who when faced with the arbitration clause in the time charter now state that other claims are added.

Under section 6 of our Arbitration Act the court has powers to stay proceedings when in its opinion there is no sufficient reason why the matter should not be referred in accordance with the arbitration clause. Section 6 of the Arbitration Act 1952 reads as follows:—

"6. If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Plaintiffs also submit that certain claims are not covered by clause 17 of the charter. The Writ of Summons issued by the plaintiffs, as a result of which the ship Dong Moon was arrested, clearly and categorically in its indorsement of claim states as follows:—

"INDORSEMENT OF CLAIM

The plaintiffs' claim is for US$89,951.27 being equivalent to M$220,110.76 for advance of Charter Hire made to the defendants their servants or agents and also for goods in the nature of necessities and other necessary materials and certain disbursements supplied to motor vessel 'Dong Moon III' which is a sister ship of the motor vessel 'Dong Moon' for her operation and maintenance at the request and/or to the order of the defendants their servants or agents on diverse dates between the 28th day of April, 1976 and the 24th day of August, 1977."

Therefore this application must be considered in the light of that indorsement. Furthermore, the fact that another claim is added need not deprive the party applying for stay of his right to stay of proceedings for the purpose of arbitration.

In *Ive & Baker* v. *William*[2] the Court of Appeal held that the fact that a small portion of the relief claimed is not within the scope of the arbitration clause is not in itself a sufficient reason for refusing to stay proceedings where the main subject of the action is within the arbitration clause.

The court therefore allowed the defendants' application in the third alternative, i.e., that all proceedings be stayed pursuant to the provisions of the Arbitration Act 1952 in particular section 6 thereof and clause 17 of the charterparty dated May 28, 1976 made between the plaintiffs and the defendants in which they expressly agreed to refer to arbritration the matters in dispute.

Counsel for defendants also addressed the court on the fact that this was a submission to arbitration made in pursuance of an agreement to which the protocol applies. The parties were from Hong Kong and Korea and under section 4(2) of the English Arbitration Act, 1950, unless there are certain reasons why stay should not be granted stay of proceedings must be granted.

Section 4(1) of the English Arbitration Act is *in pari materia* to section 6 of our Arbitration Act (Act 93).

Section 4(2) of the English Arbitration Act reads as follows:—

"Notwithstanding anything in this Part of this Act, if any party to a submission to arbitration made in pursuance of an agreement to which the protocol set out in the First Schedule to this Act applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleading or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

The First Schedule to the English Act sets out the "Protocol on Arbitration Clauses signed on behalf

of His Majesty at a meeting of the Assembly of the League of Nations held on the twenty-fourth day of September, Nineteen hundred and twenty-three" (see *Halsbury's* Statutes of England, Third Edition, p. 466).

The List of States which have signed and ratified the Protocol is set out in *Russell* on Arbitration, Eleventh Edition, at page 454. In the list appears United Kingdom and Japan [(including Chosen (Korea))].

I am therefore of the view that the stay of proceedings should be granted to the defendants. I am further of the view that even if Korea has ceased to come under the umbrella of Japan as a protocol state since its becoming independent after the war, for the reasons given earlier, a stay of proceedings should be granted to the defendants.

On the granting of the order, counsel for defendants applied to have the ship released on the authority of the judgment in *The "Golden Trader"*[3] where Brandon J. held that if there was a stay there must be a release of the ship. In view of the fact that I have relied on the rationale of the judgment the relevant part of Justice Brandon's judgment is quoted at some length:—

".. .It is to be inferred from that, that the object of the process in rem is to provide security for a plaintiff in respect of any judgment which he may obtain as a result of the hearing and determination of a claim. That is the purpose of proceeding in rem and, subject to the point I made, that it covers also payment of a sum due under a settlement in an action, it is the sole purpose of such process. It seems to me that in the present case the plaintiffs have sought to invoke the Admiralty jurisdiction of the court in rem for a wholly different purpose, or at any rate seek now to maintain that process for a wholly different purpose.

That different purpose is not security for the payment of a judgment of the court or security for the payment of a sum due under the settlement of an action in the court, but security for the payment of an award in an arbitration conducted pursuant to clause 33 of the charter-party. In my view the Admiralty Court has no jurisdiction to arrest ships or to keep ships under arrest for that purpose; it only has jurisdiction to arrest ships and keep ships under arrest for the purpose of providing security for a judgment of the court. Bail in an Admiralty action in rem represents the res, and it follows, in my view that the Admiralty Court has no jurisdiction to require bail as a condition of release, or to maintain that bail, for the collateral purpose to which I have referred."

Then later on Justice Brandon (at p. 385) goes on to state:

"The starting point, if *The Cap Bon* ([1967] 1 Lloyds Report 543) is right, is that the court can only retain the security to satisfy a judgment or a compromise in the action itself. It follows that, if the court stays the action, so that there will, in all probability at least, be no judgment or compromise in the action to be satisfied, it must then release the security. Putting it shortly, if here is a stay, there must, as a necessary consequence, be a release. In cases where the grant of a stay is discretionary, the court can refuse a stay unless alternative security is provided. The defendant then has to choose between having a stay subject to a term for the provision of such security and not having a stay at all. If he chooses the former, then, subject to his complying with the term, he gets both a stay and release; if he chooses the latter, he gets neither. By contrast, in protocol arbitration cases, where the grant of a stay is mandatory, the court cnanot refuse a stay unless alternative security is granted. It is bound to grant a stay in any event, and, since release is a necessary consequence of a stay, it is bound also to grant a release."

The words of Justice Brandon seem to be equally applicable to the case before this court. It is thus the view of the court that the defendants are entitled not only to an unconditional order for a stay but also to an unconditional order for the release of the vessel.

I would also add that from the indorsement of the writ and the affidavits it is apparent the plaintiffs in arresting the vessel acted without even being certain of what debts they were arresting the ship for. Accounts of *Dong Moon No. 3* and *Dong Moon* were hopelessly mixed up and the amount alleged to be owed seemed far in excess of what would really be found due. As I had occasion to say, in the case of *The "Beauty Orchid II"*[4]: —

"... While under Admiralty practice once a summons and claim are shown to the court the powers of arrest can be exercised immediately, the consequences of the arrest are often crippling or severely damaging to the shipowners. No doubt there is an undertaking in damages and if in the long run the plaintiff loses his case,, he will have to pay damages but the amount of damages the defendant will recover will depend on the assets or the solvency of the plaintiff. The arrest of the ship immediately exposes the defendants to various claims from cargo owners, masters, crews and others affected by the arrest. Willmer J. in the case of *The St. Elefterio* says this about the position of defendants when their ships are arrested:—

'The fact is, and this is the sanction against abuse, that the plaintiffs, if their alleged cause of action turns out not to be a good one, will be held liable for costs, and those costs will include the costs of furnishing bail in order to secure the release of the ship. The defendants can always secure the release of their ship by the simple expedient of furnishing bail. It is true that if, as they say it will, the action fails, they will probably not recover inter partes the whole of the costs of furnishing the bail; but in that respect I do not know that they are in any different position from other defendants in other types of action. That observation applies especially in these days of legal aid. There is many a defendant, who has been unsuccessfully sued, and who at the end of it all finds himself in the position that he cannot recover the whole of his costs. That is one of the incidents of litigation which, as it seems to me, parties have to accept in modern conditions'."

Upon consideration of the facts and the law and for the reasons stated above, the court therefore stayed all proceedings in the action and ordered the release of the vessel "Dong Moon's with costs.

Order accordingly.

Solicitors: *Chang & Vello; Allen & Gledhill.*